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No. 94-859

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, KANSAS, NEBRASKA AND UTAH IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the regulation at 50 C.F.R. section 17.3 which defines "harm" for purposes of section 9 of the Endangered Species Act is invalid to the extent that it includes as "harm" "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

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INTEREST OF AMICI STATES

Amici States have a vital interest in how the term "harm" in section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. sections 1531-1544 is construed. The broad interpretation of "harm" urged by petitioners, the Secretary of the Interior et al., ("the Secretary") subjects ordinary land use activities on vast tracts of private land within Amici States to federal regulation under the "take" prohibition of the ESA. The scale of such ESA regulation is considerable, both in terms of the amount of land affected and the economic impact. At last count, there were more than 400 animal species listed as endangered or threatened (hereinafter "listed" species) in the United States. *Endangered Species Technical Bulletin* 20, U.S. Dept. of the Interior (November/December 1994). Approximately 3,700 other candidate species await a listing

decision. *National Geographic*, "The Endangered Species Act" 9 (March 1995). According to the General Accounting Office ("GAO"), over ninety percent of all listed animal and plant species have habitat on nonfederal land. GAO, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* ("*GAO Report*") 1 (Dec. 1994). Of the 359 animal species that were listed as of May 10, 1993 and that had some habitat on nonfederal land, more than two-thirds (247) had over sixty percent of their habitat on nonfederal lands, and more than a fifth (76) had all of their habitat on nonfederal land. *Id.* 5 (Table 1).

For example, in California, every county contains at least one listed species, and one third of all candidate species in the United States are found in California.[1/] Coastal sage scrub habitat for the listed California gnatcatcher encompasses roughly 3.8 million acres in Southern California. See 58 Fed.Reg. 65,090 (1993). Habitat occupied by the listed Stephens kangaroo rat in Riverside County, California totals almost 20,000 acres, and includes highly desirable and developable land worth $40,000-50,000 an acre.[2/] In Northern California, the Simpson Lumber Company's habitat conservation plan for the Northern Spotted Owl, which restricts the company's timber harvesting, covers 383,00 acres. See *GAO Report, supra,* 18. The Red-Cockaded Woodpecker Management Agreement between Georgia-Pacific Corporation and the U.S.Fish and Wildlife Service ("FWS"), which specifies land use practices that Georgia Pacific must follow to

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1. *Endangered Species Act Reauthorization - Woodland: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 4 (1993); *Endangered Species Act - Incentives to Encourage Conservation by Private Landowners: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 90 (1994).

2. See Beatley, Timothy, *Habitat Conservation Planning* 130, 144 (Univ. of Texas Press 1994).

avoid a "take" through habitat modification, affects 4 million acres in the southeastern United States.[3] While economists might debate the exact economic impacts of such habitat restrictions, no one can gainsay that the current expansive definition of "harm" costs the States millions of dollars in foregone economic development and tax revenue.

The States also rely on the productivity of state-owned lands to carry out vital functions. For example, State school lands provide essential revenue for educational purposes. Consequently, section 9 "harm" restrictions not only affect the private economy within States, but also directly affect the States' ability to utilize their own resources for public purposes.

State and local officials also have been threatened with prosecution or civil suit under section 9 if they approve private land use activities that purportedly violate the "harm" regulation.[4] Threatening or suing state

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3. See *Endangered Species Act: The Role of Habitat Conservation: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 110 (1993).

4. See Thornton, R., *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 Envtl. L. 605, 613-614 (1991) (quoting a FWS letter to the Planning Director of a California city stating, with respect to a zoning action, that "the approval and implementation of the proposed action may subject . . city officials to investigations by our law enforcement branch regarding potential violations of the Endangered Species Act."); Joint Appendix ("J.A.") 47 (Spotted Owl Guidelines indicating that state officials may be liable for a "take" by approving timber harvesting on private land); Gidari, Albert, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 430-435 (1994) (describing FWS letters to the Washington Forest Practice Board). Environmental groups sued California state agencies on similar grounds. See *Marbled Murrelet v. Babbitt et al.*, C-93-1400 FMS, (U.S.D.C. N.D.Cal.) (complaint filed April 16, 1993) (Second claim for relief naming the California Board of Forestry and Department of Forestry as defendants, and alleging that state regulatory approval of a timber harvesting plan on

officials in this fashion for their regulatory decisions (rather than their activities as landowners) raises the specter of coerced state enforcement of federal ESA "take" restrictions, contrary to basic federalism principles in *New York v. United States*, 112 S.Ct. 2408 (1992).

Amici States are not hostile to the species protection objectives of the ESA. Many States have enacted their own endangered species legislation.[5/] Moreover, states like California have backed their species preservation goals with land acquisition programs to acquire needed wildlife habitat.[6/] Despite their commitment to species protection, Amici States believe that the Secretary's "harm" regulation exceeds his authority, and they respectfully submit this amicus brief in support of affirmance.

STATUTORY BACKGROUND

Section 9(a)(1)(B), 16 U.S.C. section 1538(a)(1)(B), and 50 C.F.R. section 17.31(a) make it unlawful for "any person" (which includes all private and public entities, see 16 U.S.C. section 1532(13)), to "take" a threatened or endangered species. "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,

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private land constitutes a "take" through habitat modification).

5. See e.g., Cal. Fish and Game Code sections 2500 et seq.,; Colo. Rev. Stat. 33-2-101 et seq.; Conn. Gen Stat. 26-303 et seq.; Fla. Stat. 372.072 et seq.; Hawaii Rev. Stat. 195D-1 et seq.; 520 Ill. Comp. Stat. Ann. 10/1 et seq.; Burns Ind. Code Ann. 14-2-8.5-1(1) et seq; Kansas Stats. Ann. 32-957 et seq.; Mich. Comp. Laws 299.221 et seq.; Mont. Code Ann. 87-5-101 et seq.; Neb. Rev. Stat. 37-430 et seq.; N.J.Stat.23:2A-1 et seq.; N.M. Stat. Ann. 17-2-37 et seq.; 34 Pa.C.S.A. 2167; Ore. Rev. Stat. 496.172 et seq.; 10 Vermont S.A. 5401 et seq.

6. See California Wildlife and Natural Areas Conservation Act, Cal. Fish and Game Code sections 2700-2729; Keene-Nielsen Fisheries Restoration Act, Cal.Fish and Game Code sections 2760-2765; California Wildlife Protection Act of 1990, Cal.Fish and Game Code sections 2780-2799.6.

or to attempt to engage in any such conduct." Section 3(19), 16 U.S.C. section 1532(19). (Emphasis added.) The Secretary defines "harm" as follows:

> "*Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. section 17.3. (Emphasis added).

Knowing violations of the "harm" regulation are a crime punishable by up to one year in jail and substantial fines. See 16 U.S.C. 1540(b). Violators of the "harm" regulation may also face citizen suits for injunctive relief, as well as civil penalty actions by the federal government. See 16 U.S.C. sections 1540(a), (e)(6), (g)(1)(A).

In addition to the "take" prohibition in Section 9, the ESA protects endangered species in other ways. Section 7, the so-called interagency consultation provision, directs federal agencies to ensure that actions they authorize, fund, or carry out are "not likely to jeopardize the continued existence" of endangered or threatened species, and will not "result in the destruction or adverse modification" of critical habitat of such species. 16 U.S.C. 1536(a)(2). The FWS and National Marine Fisheries Service are authorized to designate critical habitat for endangered or threatened species within their respective jurisdictions. 16 U.S.C. section 1533(a)(3).

Section 5, 16 U.S.C. section 1534, also establishes a federal land acquisition program to acquire land for the benefit of endangered and threatened species.

In 1982, Congress amended the ESA to ameliorate the harshness of the "take" prohibition in section 9. Private parties whose lawful activities would otherwise result in an illegal "take" of a listed species were authorized to obtain an "incidental take permit" for such a "take." Section 10(a)(1)(B), 16 U.S.C. 1539(a)(1)(B).

To obtain an "incidental take" permit, a private party must submit a conservation plan which minimizes and mitigates the impacts of the incidental take. 16 U.S.C. 1539(a)(2)(A). Section 7 was also amended to allow for issuance of an "incidental take statement" as part of the interagency consultation process under section 7. Section 7(b)(4), 16 U.S.C. 1536(b)(4). Like the section 10 "incidental take permit" for private activities, the section 7 "incidental take statement" for federally-conducted or permitted activities authorizes "incidental takes" which might otherwise violate the section 9 "take" prohibition.

SUMMARY OF ARGUMENT

1. Amici States urge affirmance of the decision below, but by a slightly different argument than that of respondent or the court of appeal. In our view, the crux of this dispute is whether "harm" includes habitat modification activities that injure wildlife through indirect and attenuated patterns of causation. The court of appeals used the concept of the "direct application of force" to define the proper scope of "harm." Amici States believe, however, that the distinction between indirect vs. direct causation underlies the court of appeals' reasoning, and that defining the issue in these terms -- rather than the "direct application of force" or habitat modification *per se* -- aids in analysis of the matter.

For example, Amici States agree that crushing a listed species with a bulldozer while clearing land would be a prohibited "take." The fact that the killing occurred in the course of a habitat modification activity, i.e., land clearing, would not immunize it from the "take" prohibition. But that type of "killing" or "injury" -- involving direct causation between the acts of the perpetrator and the injury to the animal -- is not in issue.

Instead, the dispute is over indirect and attenuated

patterns of causation exemplified by the *Palila* decisions.[7] There, feral sheep and goats were eating the seedlings and shoots of mamane trees. The goats and sheep were not themselves harming the endangered palila birds. Nor did the palila eat the shoots and seedlings of mamane trees, so the animals were not in direct competition for food. Instead, the shoots and seedlings would eventually become full-grown trees in twenty or thirty years, and these trees and their leaves would then be used by the palila for nesting and food. The State of Hawaii was found to be "taking" the palila because it did not prevent feral goats and sheep from eating mamane tree shoots, which years later would grow into larger trees, which in turn would be used by the palila for nesting and food in the future. Our difference with the Secretary is in whether acts (or omissions) with this indirect *Palila*-like causation (rather than the direct causation of a bulldozer crushing an animal) constitute a section 9 "take."

2. Amici States agree with the Secretary that there is an overlap among the various terms making up the definition of "take" in 16 U.S.C. section 1532(19).[8] Since the Secretary's definition of "harm" includes an act that "actually kills" a species, the overlap with the other "take" term, "kill," is apparent. However, the Secretary tries to exploit the overlap by suggesting that it shows the reasonableness of the "harm" definition, and makes it difficult if not impossible for Sweet Home to show in a facial challenge that the "harm" definition is invalid in

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7. See *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985 (D.Hawaii 1979) ("*Palila I*"), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("*Palila II*"); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070 (D.Hawaii 1986) ("*Palila III*"), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) ("*Palila IV*").

8. See Pet. Br. at 23, n. 11 ("There is no reasonable definition of "harm" that would not overlap with some of the other terms."); J.A. 68 (Final Redefinition of "Harm") ("it is obvious that there is considerable overlap in many of these terms and it would be a fruitless and impractical exercise to attempt to define any of these terms to the exclusion of the others so as to have no overlap of prohibited actions.").

every conceivable circumstance. Pet. Br. at 19, 21.

Unlike the Secretary, Amici States think that the Court should first factor out the overlap for jurisprudential reasons. Because "harm" overlaps with other "take" terms, and because none of those other terms are being challenged, the only actual controversy before the Court concerns those acts that are both within the "harm" definition and outside the scope of the other "take" terms. It would be bizarre to uphold the "harm" regulation on grounds that it properly includes certain acts or activities which everyone agrees constitute a "take" under other unchallenged terms in the "take" definition. Factoring out the overlap not only pinpoints the actual controversy, but it also highlights what, if anything, is distinctly unique about the "harm" definition. What is unique, and distinctly wrong with the "harm" definition is that it embraces within the "take" prohibition 1) habitat modification activities that 2) significantly impair essential animal behavioral patterns 3) through indirect patterns of causation unlike those contemplated by the other "take" terms, "kill," and "harass," 4) where no impact on individual members of a species need be shown, and 5) where no element of intentionality on the part of the perpetrator is required.

3. Defining "harm" to include habitat modification activities with such indirect patterns of causation is contrary to congressional intent, and should be invalidated under step one of the analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The plain meaning of "take" in the context of the ESA does not include habitat modification with *Palila*-like patterns of indirect causation. Instead, the common theme of all the other "take" terms is that they refer to acts of a perpetrator that are either intended or clearly expected to directly and immediately injure an animal or reduce it to physical possession. Using the maxim *noscitur a sociis* ("a word is known by the company it keeps") to construe "harm" like the other "take" terms is appropriate because "harm" was portrayed by its legislative sponsor as simply a "technical, clarifying amendment" to the "take" definition, not a fundamental change in the "take" concept. The specific rejection in congressional committee of language

that would have made habitat modification a "take," coupled with inclusion of habitat protections in section 7 of the ESA evidences a congressional decision to limit habitat protection obligations to section 7, and not include them within the "take" prohibition of section 9. Reliance on the "comprehensiveness" of the ESA and its broad "purpose" to protect habitat cannot override the actual text and clear legislative history. Instead, it risks being an invitation to rewrite the statute to further subjective judicial notions of "good policy."

4. Post-1973 ESA amendments and legislative history, which the Secretary relies upon for a "ratification" theory, cannot save the "harm" regulation. The 1982 amendments adding the section 10 incidental take scheme do not indicate, let alone require, that "take" include habitat modifications that indirectly injure wildlife. While section 10 contemplates habitat preservation as a remedy for an "incidental take," the incidental take itself need not involve habitat modification or indirect causation. In fact, examples of incidental take in the committee reports on the 1982 amendments all involve direct and immediate causation unlike that contemplated by the "harm" regulation.

If the "harm" regulation is contrary to the congressional intent of the 1973 ESA, then the statutory "take" definition should be amended formally if "take" is to be broadened to include habitat modification with indirect causation. Because of constitutional requirements for enactment of laws, Congress cannot achieve that same amendatory result indirectly through occasional references to the *Palila* decision or the "harm" regulation in committee hearings, or the failure to enact Senator Garn's ESA bill, or statements about the scope of "take" in post-1973 committee reports, or the enactment of other ESA provisions which do not themselves purport to amend the "take" definition.

5. The "harm" regulation skews the Secretary's administration of the ESA in several ways. The "harm" regulation is used to avoid meaningful analysis of the economic impacts of designating critical habitat under section 4. The "harm" regulation also makes the habitat

protection obligations of section 7 redundant, which might explain why fewer and fewer designations of critical habitat are being made. Finally, the "harm" regulation itself harms federal-state relations insofar as it is used to threaten or coerce state and local officials to act as federal proxies in enforcing habitat modification restrictions which actually derive from the Secretary's expansive interpretation of "harm." For all these reasons, the "harm" regulation should be invalidated under step one of the *Chevron* analysis.[9/]

ARGUMENT

I. THE NATURE OF THE ACTUAL CONTROVERSY OVER THE "HARM" REGULATION IN THIS CASE

Because "harm" overlaps with other "take" terms that are not being challenged, the "harm" definition should be compared with the other "take" terms, particularly "kill" and "harass," to isolate those elements of "harm" which are distinctive, and therefore, in controversy in this case. This does not entail an "extravagant reading" and "speculative applications" of the "harm" regulation, Pet. Br. 49, but simply parsing the language of the "harm" regulation, and distinguishing "harm" from the other statutory "take" terms and definitions.

1. Despite the Secretary's emphasis on the first sentence of the "harm" definition in 50 C.F.R. section 17.3 -- which defines "harm" as "an act which actually kills or injures wildlife" -- the first sentence is at best meaningless, and at worst misleading. Defining "harm" as an act that "actually kills" is redundant since "take" already expressly includes "kill." Thus, "actually kills" is only meaningful if

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9. Because Amici States believe that the "harm" regulation should be invalidated at step one of the *Chevron* analysis, we express no view on the substantial question whether at step two of the *Chevron* analysis, the rule of lenity must supplant deference to the Secretary's interpretation of the ESA because of the criminal penalties for violation of the "harm" regulation.

it refers to acts other than those already encompassed by the statutory term "kill." Since the statutory term "kill" presumably refers to the direct application of force that directly cause death,[10] "actually kills" is only relevant insofar as it refers to a different, indirect pattern of causation -- in which case "actually kills" (which connotes immediacy and direct causation) is positively misleading.

Defining "harm" in the first sentence as "actual injury" is also meaningless, and begs the question of what constitutes "actual injury." The only place that "actual injury" is defined by the Secretary (with particular reference to habitat modification) is in the second sentence of the "harm" definition. Thus, the first sentence of the "harm" definition drops out, and the main focus should be on the second sentence.

2. The second sentence of the "harm" definition provides that acts of "harm" include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." (Emphasis added.) The use of the word "by" (rather than "and") indicates that "actual injury" is not a separate, additional requirement; instead, "actual injury" results whenever essential behavioral patterns are impaired.[11] Consequently, only two requirements are

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10. The Secretary seems to concede as much by arguing that the term "harm" expanded the definition of "take" over what it had been in earlier wildlife statutes which used the term "kill" but did not include habitat modification prohibitions. See Pet. Br. at 25-26.

11. The district court in *Palila III*, *supra*, also construed the regulation this way by noting that habitat modification must be accompanied by "a showing of concomitant injury to Palila, such as a significant impairment of Palila breeding or feeding habitats." 649 F.Supp. at 1077, n.24 (emphasis added); see also *id.*, at 1076 n.21 (noting that the negative impact on the mamane forest "in turn injured the Palila by significantly disrupting its essential behavioral patterns." (emphasis added). Insofar as *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 939 (D.Mont. 1992) suggests that "actual injury" is an additional requirement over and above impairment of essential behavioral patterns, it either misconstrued the "harm" regulation, or shrank from construing the

needed to establish "harm": 1) significant habitat modification and 2) significant impairment of essential species behavioral patterns. The suggestion by some amici that the Court should let lower courts flesh out the contours of "actual injury" is unavailing because "actual injury" -- in the context of habitat modification -- simply means "impairment of essential behavioral patterns."

3. The main characteristic of "harm," which distinguishes it from the other "take" terms, is that it involves a much more indirect and attenuated pattern of causation. This becomes apparent by considering the term "harass." Like "harm," "harass" also focuses on acts that affect "behavioral patterns" of wildlife. See 50 C.F.R. section 17.3. However, to "harass," human actions themselves must directly "annoy" a species "to such an extent as to significantly disrupt normal behavioral patterns." *Id.* In contrast, to cause "harm," human acts modify or degrade habitat, and this habitat modification then causes "actual injury" to wildlife "by significantly impairing essential behavioral patterns." For example, cutting down trees that are not occupied by a listed bird but are merely suitable for future nesting would not be "harassment" (since no birds would be present to "annoy"). However, this would constitute "harm" since the loss of the trees purportedly might impair essential behavioral patterns like future nesting.[12/] To constitute "harassment," the birds would have to be actually present and directly annoyed by a human action (for example, playing loud music to drive them from their nests). In short, human acts must directly "annoy" species and disrupt their normal behavioral patterns under the "harass" definition. Under the "harm" definition, however, human

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regulation as broadly as it is written.

12. An example of this was the Secretary's section 4(d) "take" rule for the Louisiana Black Bear. This rule required protection not only of den trees actually used by the bear, but also "candidate den trees", ie, trees that were not actually used but were nonetheless suitable for future bear dens. See 57 Fed.Reg. 593 (1992).

acts need only modify habitat, and this habitat change then can be deemed, by some plausible biological theory, to have an indirect effect on an essential behavioral pattern. The chain of causation under the "harm" definition is much more indirect and attenuated than for "harassment."[13] Moreover, "harassment," unlike "harm" requires an element of intent to annoy, i.e.., "an intentional or negligent act or omission." 50 C.F.R. section 17.3.[14] Because neither of the terms "kill" or "harass" are being challenged here, only those acts of "harm" with indirect patterns of causation are in issue.

The Secretary, in an apparent effort to narrow the scope of the harm regulation, says that the regulation contemplates actual death or injury "directly traceable" to habitat-disturbing actions. Pet. Br. at 45. (Emphasis added.) While Amici States agree that "harm" is limited to direct and not indirect *Palila*-like causation, the harm regulation, on its face, does not contain any "directly traceable" limiting language. Moreover, because the Secretary thinks that the *Palila* cases are examples of "directly traceable" harm, see Pet. Br. at 45, "directly traceable" (like "actual injury and death") is not a genuine substantive limitation on the scope of "harm."

4. The concomitant of the indirect pattern of causation contemplated by the "harm" regulation, is that "harm" can be established without any showing of an impact on an individual animal. Instead, an impact at the

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13. The genesis of the "harm" regulation also supports this analysis. Originally, the Secretary wanted to include the habitat modification concept in the definition of "harass" when it was originally proposed in 1975. See 40 Fed.Reg. 28,714 (1975). However, because the habitat modification notion presumably stretched the concept of causation in "harass" to the breaking point, the Secretary deleted it from the definition of "harass" and used the term "harm" as the vehicle for habitat modification. See J.A. 50.

14. While the Secretary says that "harass" does not fit the court of appeals' paradigm of the direct application of force, Pet. Br. at 27, the Secretary overlooks the fact that "harass" involves a more direct pattern of causation than "harm".

group or "collective" species level is sufficient to establish "harm." The Secretary, in promulgating the "harm" redefinition in 1981 acknowledged this fact[15], as have courts and commentators.[16] In *Palila III*, harm at the species level was carried to an even more bizarre extreme because the overall population of palila had actually increased, see 649 F.Supp. at 1073, yet the district court still found "harm" to the species based on an adverse impact on "recovery," i.e., the population was not increasing as rapidly as one would expect under conditions of "recovery." See 649 F.Supp. at 1075.

In sum, the actual dispute over the "harm" regulation narrows to whether acts that 1) modify or degrade habitat, and 2) thereby significantly impair essential behavioral patterns, 3) through indirect patterns of causation unlike those contemplated by the terms "kill" and "harass," 4) where no impact on individual species need be shown, and 5) where no element of human intent is required, constitute "harm" and a prohibited "take" within the meaning of Section 9.

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15. See J.A. 67 (Final Redefinition of "Harm", stating, it is not the intent of the final "harm" regulation to "limit[] 'harm' to direct physical injury to an individual member of the wildlife species."). (Emphasis added).

16. See *Palila III, supra*, 649 F.Supp. at 1075 ("A finding of "harm" does not require death to individual members of the species"); id. at 1077 ("injury to the species does not necessitate a finding of death to individual species members.") (Emphases added). See also Bean, Michael J., *The Evolution of National Wildlife Law* 344 (1983) ("direct, physical injury to an individual member of a protected species is not required to constitute harm. Rather, the significant impairment of essential behavioral patterns is sufficient to constitute actual injury to the species, whether or not any individual member of that species suffers direct, physical injury.").

II. THE PLAIN MEANING OF THE TERM "HARM" IN THE CONTEXT OF THE ESA DOES NOT INCLUDE HABITAT MODIFICATION THAT ONLY INDIRECTLY INJURES WILDLIFE

1. While the dictionary definition of "harm" includes "injure," "damage" and "hurt," "harm" must be construed, not in the abstract, but in the particular context of the ESA. Using the maxim *noscitur a sociis* ("a word is known by the company it keeps"), is not only a common method of statutory construction,[17] but it is doubly appropriate here because of the genesis of the "harm" term. "Harm" was added on the Senate floor without any debate as part of a package of 24 other amendments that were described by Senator Tunney, the floor manager, as "technical and clarifying amendments." See 119 Cong.Rec. 25,682-83 (1973). Since Congress' intent was not to significantly change the then-existing scope of the "take" definition, it makes sense to construe "harm" like the other "take" terms. This is not a case of picking and choosing among various canons of statutory construction to reject a reasonable agency construction. See Pet. Br. at 22, n.10. Instead, the use of *noscitur* is faithful to the understanding and intent of Congress when it added "harm" to the statute.[18]

2. In comparing "harm" to the other "take" terms, two common themes emerge. First, all of the other terms, i.e.,"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," "collect," refer to acts of a perpetrator rather

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17. See *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994); *United States v. Burke*, 112 S.Ct. 1867, 1875 (1992) (Scalia, J., concurring); *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985).

18. According to *Gidari, supra*, p.78, the Secretary's amicus curiae brief in *Palila IV*, 852 F.2d 1106 (9th Cir. 1988), argued much the same thing by stating: "It is inconceivable that addition of the term characterized as a 'technical' insertion should be the basis for an interpretation both significantly broader than the other statutory terms and inclusive of a specific concept (habitat modification) eliminated from the bill."

than an adverse effect on an animal. This is confirmed by the last phrase of section 1532(19) which includes as a "take" any "attempt to engage in any such conduct"., 16 U.S.C. section 1532(19) (Emphasis added). "Such conduct" refers to the preceding list of "take" terms, i.e., "hunt," "shoot," "wound," etc; therefore, these terms refer to "conduct" of a perpetrator, not "injury" to a species. Moreover, since an attempt can fail and cause no injury at all to an animal yet still constitute a "take", (like an unsuccessful attempt to "trap" an animal), the "take" definition looks fundamentally to the acts of the perpetrator, not the adverse impact on wildlife.

The second common theme of the "take" terms is that all of these acts of a perpetrator involve either an intent to injure an animal, or the immediate foreseeability of injury as a direct and immediate result. Thus, the pattern of causation between the act of the perpetrator and injury to the animal is immediate and direct. While the Secretary says that *noscitur* is inappropriate because the "take" definition includes both "broader" and "narrower" terms, Pet. Br. at 22, and because not all of the "take" terms involve the "direct application of force," *id.*, this sidesteps the key issue of whether the other "take" terms divulge any common theme regarding causation. Amici States believe that all of the "take" terms contemplate direct and immediate causation -- and that is what is at issue, not whether the terms are "broad" or "narrow."

The alternative to using *noscitur* to identify the type of causation contemplated by the other "take" terms is to take the abstract, dictionary definition of "harm" as "injure," "damage" or "hurt," and then include every conceivable human act that "injures" or "hurts" regardless of how indirect and attenuated the pattern of causation between the act and the injury.[19] That not only would

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19. This seems to be the Secretary's argument since he contends that there is no reason why Congress would have wanted to exclude injury to wildlife when it is brought about indirectly through habitat destruction, Pet. Br. at 21, and that "harm" should apply to all conduct that the other

make all the other "take" terms redundant (since "harm" would cover them all), but it would be contrary to Congressional intent to construe "harm" like the other "take" terms, i.e., as a "technical" addition and mere "clarification."

3. Use of the term "take" or its variants in other provisions of the ESA also indicates that "take" refers to the direct physical "take" of individual animals, not actions that indirectly cause injury at the aggregate or species level through habitat modification. See 16 U.S.C. section 1539(e)(1) (taking by certain Alaska natives not prohibited "if such taking is primarily for subsistence purposes," but taking by non-natives is prohibited if they are not primarily dependent upon "the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing"); *id.*, section 1539(e)(2) "taking [under the Alaska natives taking exception] may not be accomplished in a wasteful manner"); *id.* section 1539(i) (no importation violation if "fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any"); *id.*, section 1540(e)(4)(A) ("All fish or wildlife or plants taken . . . shall be subject to forfeiture"). (Emphases added.) Because "take" was used throughout the ESA in its common well-established sense of a direct physical "take" of individual animals, and because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaff v. United States*, 114 S.Ct. 655, 660 (1994), "harm" should not be given a radically different meaning of habitat modification and indirect causation which is alien to all the other "take" terms.

"take" terms "exemplify", *id.* at 23.

III. THE LEGISLATIVE HISTORY OF THE 1973 ESA CONFIRMS THAT "HARM" DOES NOT INCLUDE HABITAT MODIFICATION THAT ONLY INDIRECTLY INJURES SPECIES

1. S. 1983, the precursor bill for the ESA, originally defined "take" to include "the destruction, modification, or curtailment of a [species] habitat or range." See S. 1983, section 3(6), reprinted in *Endangered Species Act of 1973: Hearings Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) ("*1973 Senate Hearings*"). However, this language was deleted from the bill in the Senate Commerce Committee even though representatives of environmental organizations urged that "take" should include habitat modification. *1973 Senate Hearings*, 80, 86, 104, 106, 108, 116, 123. H.R. 37, the House bill did not include habitat modification language in its "take" definition, *Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 90 (1973) ("*1973 House Hearings*"), even though environmental organization representatives urged its inclusion during House committee hearings, *id.* at 299, 301, 305-306, 307, 309. Thus, both Houses of Congress rejected entreaties to include the concept of habitat modification in the "take" definition, and the Senate committee struck specific habitat modification language from the "take" definition in the bill it reported.

As noted previously, the term "harm" was added to the legislation on the Senate floor, without any debate, as part of a package of "technical and clarifying" amendments. Other than the general statement that they were "technical and clarifying" amendments that were "important" and would "help achieve the purposes of the bill," 119 Cong.Rec. 25,683 (1973), no other explanation was given why "harm" was added to the "take" definition.

Significantly, members of both bodies distinguished between habitat modification -- which was to be remedied through the land acquisition program of section 5 -- and

"predation" of animals -- which was to be controlled through the "take" prohibition. See 119 Cong.Rec. 30,162 (Rep. Sullivan); *id.*, 25,669 (Sen. Tunney); *id.*, 25,691 (Sen. Nelson); *id.*, 25,675-25,676 (Sen. Williams). Nowhere in the 1973 legislative history is there any evidence that Congress intended or understood the terms "harm" or "take" to include habitat modification that only indirectly causes injury to listed species.

2. Given this legislative history, it seems inescapable that "harm" does not include habitat modification. Where Congress expressly deleted habitat modification language from a precursor bill, inclusion of the same concept by way of agency-adopted regulation reaches a result that Congress "expressly declined to enact". *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *TVA v. Hill*, 437 U.S. 153, 181-182 (1978) (according significance to differences between the final ESA legislation and the earlier bill, S. 1983). The Secretary, however, urges that the rejection of the broad habitat modification language in S. 1983 does not necessarily indicate rejection of a more limited concept of "significant" habitat modification that "actually kills or injures" species "by significantly impairing essential behavioral patterns." Pet. Br. 29. But if the Senate Committee or Congress had intended to endorse a narrower class of habitat modifications as a "take," surely they would have amended the habitat modification language in S. 1983 to reach that more limited result rather than delete the habitat modification language entirely. Since Congress provided for protection against the "adverse modification or destruction of [critical] habitat" in section 7, 16 U.S.C. section 1536(a)(2), it would have had no difficulty devising similar language referring to "habitat modification" if it had intended "take" to include a more limited version of that concept. Moreover, if the term "harm" (which the Secretary otherwise portrays as a general term signifying "injure," "damage" "hurt," Pet. Br. 20) also does double duty as a shorthand reference to a smaller subclass of habitat modifications, then surely "harm" would not have been portrayed by its legislative sponsor as an innocuous technical amendment, particularly

when the relevant Senate committee had rejected a closely related habitat concept. The only plausible interpretation is that Congress rejected the whole concept of habitat modification and its indirect impact on species as a "take," and did not intend "harm" to bring in by the back door a habitat modification concept previously rejected in committee.

The reference in Senate Report No. 307 that "take" be defined broadly, Pet. Br. 27-28, cannot justify the Secretary's definition of "harm." The Senate Report was referring to the "take" definition in the Senate bill before the term "harm" was added to the legislation. The Secretary, as far as we are aware, does not contend that the "take" definition, at this stage of its evolution, included habitat modification.[20/] Thus, the reference to defining "take" broadly simply refers to "direct, physical" takes. Since the bill reported from committee included the terms in S. 1592, plus "harass" from S. 1983, see Pet. Br. 28, it made sense for the Senate Report to say that "take" had been defined broadly, i.e., it incorporated "take" terms from both bills. However, the reference in the Senate Report to the broadest possible definition cannot apply to the term "harm" which had not yet been added to the bill, and cannot negate the statement of the "harm" amendment sponsor that it was merely a technical, clarifying amendment.

While the 1973 Congress recognized the importance of habitat for endangered species, that cannot justify construing "harm" as the Secretary has. When it enacted earlier endangered species legislation in 1966 and 1969, Congress also recognized that habitat loss was a major

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20. By deleting the habitat modification concept from the proposed definition of "harass" in 1975, see J.A. 50, the Secretary apparently conceded that "harass" cannot support a habitat modification concept. All of the other "take" terms in S.1983 as it emerged from Committee, i.e., "pursue", "hunt", "shoot", "wound", "kill", "trap", "capture", "collect" or "attempt to engage in any such conduct" on their face do not cover ordinary habitat modification like land clearing and timbering.

cause of species extinction.[21/] Despite awareness of the importance of habitat, Congress chose not to restrict private habitat modification activities through a "take" or any other restriction in the earlier endangered species legislation. While the Secretary suggests it is anomalous that Congress would prohibit the killing or injuring of wildlife by rifle shot but not by habitat modification, Pet. Br. 21, statutes are political compromises, not exercises in perfect policymaking. All along Congress has been willing to outlaw what are commonly thought of as "direct physical takes" of wildlife, but unwilling to criminalize as a "take" a broad range of common land use activities that have only indirect impacts on wildlife.[22/] In the end, the "policies" and "comprehensiveness" of the 1973 legislation is too vague and protean a concept to be a reliable guide to legislative intent, and cannot override the plain language and legislative history that stands in the

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21. See Endangered Species Protection Act of 1966, Pub.L.No.89-669, section 1(c), 80 Stat. 926 (endangered status can be based upon finding that species "habitat is threatened with destruction"); section 1(b) (congressional policy that federal agencies "preserve the habitats of . threatened species"); Endangered Species Conservation Act of 1969, Pub.L.No. 91-135, section 3(a)(1), 83 Stat. 275, (endangered status can be based upon "the destruction, drastic modification or severe curtailment . . of . . habitat"); see also S. Rep. No. 526, 91st Cong., 1st Sess. 2 (1969) (recognizing "destruction of habitat in which the species can live and propagate" as one of the basic reasons for species extinction).

22. While the Secretary urges that the 1973 ESA represents an expansion of the "take" concept over that in earlier wildlife legislation, Pet. Br. 25-26, the only significant new "take" terms in 1973 were "harass" -- which the Secretary appears to concede does not include habitat modification, see *infra*, p.20, n.20, and "harm" which was merely a "technical, clarifying amendment". We do agree that the 1973 ESA differs markedly from the earlier endangered species and wildlife acts in terms of other protections and procedures. However, "take" in other wildlife statutes had acquired the generally accepted meaning of acts that are intended or expected to directly and immediately injure wildlife, and this carried through in the 1973 ESA legislation.

way of the Secretary's interpretation.[23]

IV. THE POST-1973 ESA AMENDMENTS AND LEGISLATIVE HISTORY DO NOT RATIFY THE "HARM" REGULATION

1. The post-1973 ESA amendments and legislative history should not be treated as purported evidence of the reasonableness of the "harm" regulation. Instead, the post-1973 legislative materials stand in a fundamentally different light than those for the 1973 Act. The "take" definition was enacted in 1973, and has never been amended. Therefore, the relevant reference point for congressional intent is 1973 when the definition was enacted, not some "evolving" intent that becomes apparent over time through various amendments to the ESA. Cf. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 n.7 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment."). Even if a post-1973 Congress or committee thereof believed that "harm" included habitat modification, "the views of one Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight" *U.S. v. X-Citement Video, Inc.*, 115 S.Ct. 464, 471, n. 6 (1994); see also *Central Bank v. First Interstate Bank*, 114 S.Ct. 1439, 1452 (1994); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 839-840 (1988). The reenactment or ratification doctrine -- i.e., the notion that Congress can be presumed to have ratified an administrative or judicial

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23. See City of *Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594 (1994) "it is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."); *Central Bank v. First Interstate Bank*, 114 S.Ct.1439, 1453-54 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act"); *MCI Telecommunications v. American Tel. & Tel.*, 114 S.Ct. 2223, 2233 (1994) ("our estimations, and the [FCC's] estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1943.").

construction of a particular statute by reenacting that specific statute after being fully aware of the administrative or judicial construction -- does not strictly apply here. The "take" definition in the ESA has never been reenacted, and there is only tenuous evidence of congressional awareness of the "harm" regulation. Moreover, it is questionable whether the reenactment doctrine is still viable. See *Brown v. Gardner, supra*, 115 S.Ct. at 556 ("There is an obvious trump to the reenactment argument, however, in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction,'" quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).) Thus, if the Court finds under step one of the *Chevron* doctrine that the "harm" regulation is contrary to congressional intent in the 1973 legislation, it is doubtful whether <u>any</u> showing of post-1973 legislative history could <u>ever</u> sustain the Secretary's "harm" regulation. Instead, the Enactment and Presentment Clauses should require that the "harm" definition be formally amended, in compliance with Constitutional law-making processes, to attain the desired alteration in the meaning of "take." It should not be constitutionally permissible to accomplish the same amendatory result through "indirection," *N.L.R.B. v. Health Care & Retirement Corp.*, 114 S.Ct.1778, 1785 (1994), such as by statements in committee reports or hearings, *id.* at 1784; *SEC v. Sloan*, 436 U.S. 103, 120-121 (1978); by not enacting other legislative proposals or through silence, *Brown v. Gardner, supra*, 115 S.Ct. at 557; *Central Bank, supra*, 114 S.Ct. at 1453; *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989); or by enacting other statutory provisions which do not themselves purport to amend the "take" definition in section 1532(19).

2. In any event, enactment of the Section 10 "incidental take" permit scheme does not ratify, either expressly or impliedly, the "harm" regulation. "Incidental" for purposes of Section 10 simply means unintentional, i.e., not the purpose of the original activity. See section 10(a)(1)(B) (referring to taking "incidental to, and not the purpose of" the activity); 50 C.F.R. section 17.3 (defining

"incidental taking"); H.R. Rep. No. 567, 97th Cong., 2d Sess. 31 (1982). It says nothing at all about the pattern of causation by which an unintentional take occurs. The fact that one can anticipate an "incidental" take in advance does not imply that habitat modification activities with indirect causation must necessarily be included as "incidental" takes. For example, the classic example of an "incidental" take -- taken directly from the 1982 ESA hearings,[24/] -- is a power plant which (without intending to do so) entrains listed fish, eggs or larvae into its cooling system, killing them. Such a take is "incidental," i.e., unintentional and not the purpose of the power plant, yet it also can be anticipated in advance if one knows that the fish inhabit the waters by the cooling intake. However, the "take" in such a case still involves direct and immediate causation whereby the fish are killed by the pump rotators, rather than through an indirect *Palila*-like pattern of causation.[25/]

3. The provision for "conservation plans" in section 10 also does not ratify the "harm" regulation. To continue with the above "incidental" take example, if the power plant knows that listed fish may be taken, it can seek to minimize or mitigate the expected "take;" for example, monitoring for the presence of the fish and reducing

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24. See *Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 356-360 (1982) ("*1982 House Hearings*"); *Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 2d Sess. 295-303 (1982) ("*1982 Senate Hearings*").

25. That the power plant entrainment example might arise under section 7, rather than section 10, see Pet. Br. 36, n.22, is of no moment since similar examples readily arise under section 10. For example, private farmers throughout California (and the West) divert large quantities of water -- the lifeblood of the West -- from streams that may contain listed species. Such diversions may "incidentally" take listed species in those waters, and kill them by battering against pump blades, fish screens, etc.

pumping when fish are present, or using alternative cooling methods during certain seasons or times when fish are expected. However, some fish will be "taken" inevitably, so the only way to compensate for the loss would be to provide some offsetting habitat benefits. Much as the power plant might prefer to buy or obtain like-kind fish to replace those incidentally taken, the fish are, by definition, scarce i.e., threatened or endangered, so the only coin of the realm is some form of "habitat" benefits. The Secretary goes too far in suggesting that because provision of habitat is the prescribed (indeed, often the only) remedy, the original "take" also must involve habitat modification or loss. To the contrary, the examples of "incidental" take in the Congressional reports on the 1982 ESA amendments all involve what we have called "direct, physical" takes and immediate causation. None of them involve indirect causation or habitat modification activities.[26/]

4. The San Bruno Mountain Butterfly plan was clearly the model that Congress had in mind when it provided for Section 10 conservation plans -- indeed, the parties interested in the San Bruno plan were largely responsible for obtaining the Section 10 legislation. See 1982 House Hearings, 327-335, 339-340. But it reads too much into the legislative history to suggest that Congress understood or assumed that the threatened "take" of butterflies on San Bruno Mountain was based on habitat modification, and not a direct physical take of butterflies. The legislative history does not expressly characterize the threatened San Bruno "take" as "harm" based on habitat

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26. See S.Rep. No.418, 97th Cong., 2d Sess. 8 (1982) (referring to "incidental taking of experimental populations, such as the inadvertent taking of experimental fish species by those fishing for other species on the same body of water"); H.R.Rep. No. 567, 97th Cong., 2d Sess. 27 (1982) (referring to incidental take example of "eggs of an endangered or threatened fish which will be sucked into a power plant when water is used as a cooling mechanism"); *id.*, 34 (referring to incidental taking "of experimental fish species by those fishing for other species in the same body of water").

modification. This is understandable since Congress was more interested in a solution to the San Bruno problem rather than characterizing the type of "take" involved. Nonetheless, it is clear that the San Bruno development would have destroyed, through bulldozing and clearing, almost all of the area occupied by the threatened butterflies. Therefore, the landclearing effort would necessarily have injured and "harmed" butterflies directly -- i.e., by crushing and killing the eggs, larvae and the butterflies themselves through bulldozing and ground leveling. See *1982 House Hearings* 335 (*New York Times* article in the hearing record, stating: "Since the butterflies lived year-round on the mountain, any construction would kill some of them and destroy part of their habitat.") (Emphasis added.) Thus, while Congress knew that the San Bruno example involved a land use development, it is more likely that Congress assumed that a direct physical "take" was involved, rather than an indirect "take" through habitat modification. Moreover, the Secretary has not and cannot show that the Section 10 "incidental take" permit scheme only makes sense if "take" includes habitat modification. Instead, Section 10 is still a completely meaningful provision if "take" is assumed to involve only direct patterns of causation.

5. Finally, the main purpose of the 1982 amendments was to lessen the burdens that section 9 placed on private and governmental projects and activities. It would stand those amendments on their head to find that they expanded section 9 by ratifying a "harm" definition not otherwise included within the scope of the original 1973 Act.

V. THE "HARM" REGULATION DISTORTS THE SECRETARY'S INTERPRETATION AND ADMINISTRATION OF THE ESA

1. The "harm" regulation distorts the Secretary's administration of the ESA in several ways. First, the "harm" regulation is used as a justification for not conducting a meaningful analysis of the economic impacts of designating critical habitat. Section 4(b)(2), 16 U.S.C.

section 1533(b)(2) provides, in pertinent part, that the Secretary shall designate critical habitat "after taking into consideration the economic impact" of such designation. This provision, which was added to the ESA as part of the 1978 amendments, was described by Rep. Murphy, the House floor manager, as "the most significant provision in the entire bill," 124 Cong. Rec. 38,666 (1978). The provision was intended to significantly change the way that critical habitat designations had been made, and make them no longer based solely on biological criteria. See H.R. Rep. No. 1625, 95th Cong., 2d Sess. 17.

The FWS however, avoids this requirement of analyzing economic impacts, partly through the "harm" regulation. FWS argues that habitat is protected under both the section 7 "no-jeopardy" and section 9 "take" prohibition. Listing a species -- which is based solely on non-economic biological criteria -- automatically triggers these section 7 and 9 habitat protections, according to FWS. Therefore, the only economic impacts that need be considered in designating critical habitat are those "incremental" economic impacts over and above economic impacts attributable to section 7 and 9 habitat protection. These "incremental" economic impacts invariably turn out to be minimal. Thus, defining Section 9 "harm" as habitat modification helps eviscerate the section 4(b)(2) requirement to consider economic impacts in designating critical habitat. The FWS has not only used the "harm" regulation and the magic of "incrementalism" to dispense with meaningful economic analysis of the impacts of designating a large portion of California's developed water supply as critical habitat for the delta smelt,[27] but it routinely uses this "incrementalism" argument in

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27. See 59 Fed.Reg 857 (1994) (proposed critical habitat for the delta smelt) ("The Act provides significant protection to species, including protection to their habitats, as a result of listing. Therefore, the direct economic and other impacts resulting from additional habitat protection through critical habitat designation may be incrementally small.")

designating critical habitat under the ESA.[28/]

2. The "harm" regulation also makes section 7 redundant insofar as habitat is concerned. In addition to the avoidance of jeopardy to species, section 7(a)(2) imposes upon federal agencies the obligation to avoid "the destruction or adverse modification of [critical] habitat." "Critical habitat" consists of those areas that are essential to the "conservation" of the species. 16 U.S.C. section 1532(5)(A). "Conservation" (or its synonym "recovery," see 50 C.F.R. section 402.02) refers to bringing a species back to the point at which listing as threatened or endangered is no longer necessary. 16 U.S.C. section 1532(3).

Although "critical habitat" consists of that area needed for "recovery" of a species, the Secretary has defined the duty in section 7(a)(2) to avoid "the destruction or adverse modification of critical habitat" more narrowly.[29/] Modification of critical habitat must rise to a certain level, i.e., it must affect species "survival" as well as "recovery," before the section 7(a)(2) prohibition against modifying critical habitat is triggered. The jeopardy standard in section 7 is also keyed to the same standard of "survival and recovery." See 50 C.F.R. section 402.02. Therefore, under FWS's regulations, the "jeopardy" and "destruction/adverse modification of critical habitat" standards in section 7 are one and the same, as both the FWS[30/] and commentators have recognized.[31/]

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28. See 59 Fed. Reg. 39,717 (1994); 58 Fed. Reg. 68,551 (1993); 58 Fed. Reg. 17,183 (1993); 58 Fed. Reg. 6,586 (1993); 57 Fed. Reg. 57,052 (1992); 57 Fed. Reg. 36,627 (1992).

29. 50 C.F.R. §402.02 provides:

"Destruction or adverse modification means a direct or indirect alteration that apparently diminishes the value of critical habitat for both the survival and recovery of a listed species." (Emphasis added).

30. See 56 Fed. Reg. 19,812 (1991) ("'Destruction or adverse modification' is defined as an alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. In practice, the threshold required to make a finding of

It follows from this that the "harm" regulation makes section 7 critical habitat protections redundant.[32] Habitat modification qualifies as "destruction/adverse modification of critical habitat" in section 7 only when it rises to the level of threatening species jeopardy. In contrast, habitat modification qualifies as "harm" under the Secretary's regulation when it merely impairs "essential behavioral patterns" like breeding, feeding, or sheltering of a single animal. It would be virtually impossible to threaten jeopardy to a species (and trigger the section 7 "destruction/adverse modification" prohibition), yet not impair essential behavioral patterns of a single animal (which is enough to trigger "harm" under section 9). Thus, the section 9 "harm" prohibition not only completely duplicates the habitat protection of section 7, but it goes way beyond it in scope, in effect extending section 7 habitat protections to areas not designated as critical habitat. This may explain why designations of critical habitat have not kept pace with listing decisions, see *GAO Report, supra,* 6 (noting only 105 critical habitat designations) despite Congress' intent that they be done concurrently in most cases. 16 U.S.C. section 1533(a)(3)(A) (critical habitat to be designated concurrently with a listing decision "to the maximum extent

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'jeopardy' or 'destruction or adverse modification' of critical habitat are identical.") (Emphasis added); see also 57 Fed. Reg. 57,053 (1992); 58 Fed. Reg. 17,183 (1993); 58 Fed. Reg. 45,272 (1993); 58 Fed. Reg. 68,550 (1993).

31. See Stelle, W., *Major Issues in Reauthorization of the Endangered Species Act*, 24 Envtl. L. 321, 325 n.19 (1994); Yagerman, K., *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 Envtl. L. 811, 840-814 (1990); *Habitat Conservation Planning, supra,* 220, n.7.

32. See Salzman, J., *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 Harv.Env.L.R. 311, 329 (1990); Bean, M., *The Evolution of National Wildlife Law* 397 (U.S.Gov.Printing 1977).

prudent and determinable"); 50 C.F.R. section 424.12(a); H.R. Conf. Rep. No. 1804, 95th Cong.,2d Sess. 27 (1978)(noting the "rather rare instances where no critical habitat is proposed concurrently with the listing"); H.R. Rep. No.1625, 95th Cong. 2d Sess. 18 (1978) (same). Construing section 9 to protect habitat, as the Secretary has done, achieves the section 7 habitat protection purpose without the bother of analyzing the economic impacts of designating critical habitat.

CONCLUSION

Because the Secretary's "harm" regulation exceeds the scope of the ESA, and is contrary to clearly expressed congressional intent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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